Supreme Court of the United States,

OCTOBER TERM, 1905.

No.

ORIGINAL.

COMMONWEALTH OF KENTUCKY, *Petitioner*,

vs.

ANDREW M. J. COCHRAN.

PETITION FOR WRIT OF MANDAMUS.

BRIEF FOR THE PETITIONER.

The question in this case is whether the circuit court of the United States had jurisdiction, under section 641 of the Revised Statutes of the United States, to remove the criminal prosecution which was pending against Caleb Powers in the circuit court of Scott county, Kentucky, for an offense against the laws of that state, into the federal court, and to take him from the custody of the state court.

Sections 641 and 642 are as follows:

"Sec. 641. When any civil suit or criminal prosecution is commenced in any state court, for any cause whatsoever, against any person who is denied or can not enforce in the

judicial tribunals of the State, or in the part of the State where such suit or prosecution is pending, any right secured to him by any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction of the United States, or against any officers, civil or military or other person, for any arrest or imprisonment or other trespasses or wrongs, made or committed by virtue of or under color of authority derived from any law providing for equal rights as aforesaid, or for refusing to do any act on the ground that it would be inconsistent with such law, such suit or prosecution may upon the petition of such defendant, filed in said State court at any time before the trial or final hearing of the cause, stating the facts and verified by oath, be removed, for trial, into the next circuit court to be held in the district where it is pending. Upon the filing of such petition all further proceedings in the State courts shall cease, and shall not be resumed except as hereinafter provided. But all bail and other security given in such suit or prosecution shall continue in like force and effect as if the same had proceeded to final judgment and execution in the State court. It shall be the duty of the clerk of the State court to furnish such defendant, petitioning for a removal, copies of said process against him, and of all pleading, depositions, testimony, and other proceedings in the case. If such copies are filed by said petitioner in the circuit court on the first day of its session, the cause shall proceed therein in the same manner as if it had been brought there by original process; and if the said clerk refuses or neglects to furnish such copies the petitioner may thereupon docket the case in the circuit court, and the said court shall then have jurisdiction therein, and may, upon proofs of such refusal or neglect of said clerk and upon reasonable notice to the plaintiff, require the plaintiff to file a declaration, petition, or complaint in the cause; and, in case of his default, may order a non-suit and dismiss the case at the costs of the plaintiff, and such dismissal shall be a bar to any further suit touching the matter in controversy. But if, without such refusal or neglect of said clerk to furnish such copies and proof thereof, the petitioner for removal fails to file copies in the circuit court, as herein provided, a certificate under the seal of the circuit court, stating such fail-

ure shall be given, and upon the production thereof in said State court, the cause shall proceed therein as if no petition for a removal had been filed.

Sec. 642. When all the acts necessary for the removal of any suit or prosecution, as provided in the preceding section, have been performed, and the defendant petitioning for such removal is in actual custody on process issued by said State court, it shall be the duty of the clerk of said circuit court to issue a writ of habeas corpus cum causa, and of the marshal, by virtue of said writ, to take the body of the defendant into his custody, to be dealt with in said circuit court according to law and the orders of said court, or, in vacation, of any judge thereof; and the marshal shall file with or deliver to the clerk of said State court a duplicate copy of said writ."

The petition for removal, which is at page 10 of the printed record, is based upon two grounds. It alleges (1) that William S. Taylor was governor of Kentucky on March 10, 1900, that he granted a pardon, as governor, on that day to Caleb Powers for the crime for which he is held under indictment, and that the State court has refused to recognize the pardon; and (2) that he is denied and can not enforce, in the judicial tribunals of Kentucky, rights secured to him by the Constitution and laws of the United States, by reason of section 281 of the Criminal Code of Kentucky.

The circuit court rejected the first of these grounds for removal, and sustained the second.

The decision of the Court of Appeals of Kentucky that W. S. Taylor was not governor of the state when he assumed to grant a pardon to Powers, and that the pardon is therefore invalid, presents no federal question.

On Powers' appeal from his first conviction, the court of appeals of Kentucky unanimously held that William S. Taylor was not governor on March 10, 1900, when he assumed to grant a pardon to Powers, and that the pardon was there-

fore not valid. Powers vs. Commonwealth, 110 Ky. 386. The court held that they knew judicially who the governor of Kentucky was on March 10, 1900, and that they would take judicial cognizance of the facts necessary to a decision of the question. They found from the records of the legislature that in a contest between Taylor and Beckham the general assembly of Kentucky had determined, prior to March 10, 1900, that William Goebel, and not William S. Taylor, had been elected governor of Kentucky. They said:

"The legislative record shows that the general assembly determined the contest. By the Goebel election law of March 11, 1898 (Ky. St. sec. 1596a, subsec. 11), that decision was a judgment determining the title to the office. It was a self-executing judgment: 'When a new election is ordered or the incumbent adjudged not to be entitled, his powers shall immediately cease, and if the office is not adjudged to another it shall be deemed to be vacant.'"

They referred to their former decision in Taylor vs. Beckham, 108 Ky. 278, in which they held that the judgment of the legislature was final and conclusive, and not open to judicial review, and said:

"That decision settled the question finally and the pardon must be adjudged invalid."

The foregoing decision of the court of appeals of Kentucky that Taylor was not governor of the State on March 10, 1900, presents no federal question, and if erroneous, denies no right secured to him by the Constitution or laws of the United States. It would not justify a writ of error from this court, much less a removal of the criminal prosecution, in advance of trial, into the circuit court of the United States. The court dismissed the writ of error in Taylor vs. Beckham, 178 U. S. 548, for want of jurisdiction, saying at page 578:

"It is clear that the judgment of the court of appeals in declining to go behind the decision of the tribunal vested by

the state constitution and laws, with the ultimate determination of the right to these offices, denied no right secured by the fourteenth amendment."

The office of governor of Kentucky is created by the Constitution and laws of the State, and not by those of the United States. It is the laws of the State which provide for the contest of elections and declare the effect of the decision of the legislature.

In In re Converse, 137 U. S. 624, Chief Justice Fuller said, at p. 631:

"The state can not be deemed guilty of a violation of its obligations, under the constitution of the United States, because of a decision, even if erroneous, of its highest court while acting within its jurisdiction."

In Lambert vs. Barrett, 157 U. S. 697, p. 699, Chief Justice Fuller said:

"With the disposition of state questions by the appropriate state authorities, it is not the province of this court to interfere."

It must be regarded as settled by the decision of the court of appeals of Kentucky in Powers vs. Commonwealth, 110 Ky. 386, and by the judgment of this court in Taylor vs. Beckham, 178 U. S. 548, that the decision of the legislature of Kentucky, in the proceeding between Beckham and Taylor to contest the election for governor, was final, and not subject to review by any court, state or federal. The statute, as pointed out by the Chief Justice in Taylor vs. Beckham, 178 U. S. 548, at p. 578, provided that when the "incumbent was adjudged not to be entitled, his powers shall immediately cease." The result was, that from and after the day on which the legislature decided the contest in favor of Beckham, Taylor had no power to grant a pardon, and the document purporting to be a pardon, issued by him on March 10, 1900, was void.

The circuit court disposed of the question as follows (Rec. 286):

"It remains to say a word or two in conclusion in regard to the first paragraph of the petition, in which it is claimed that defendant is entitled to a removal because the State courts have denied the validity of the pardon issued by Taylor. In order for that to be a good ground for removal it is necessary, in addition to such denial, that defendant had a right to be released from custody because of such pardon, and further that the right to such release was secured to him by the fourteenth amendment. As to the right to be released from custody because of said pardon, I do not think that I have the right to pass upon the question on its merits. The question as to who was governor of Kentucky de jure and de facto on the 10th of March, 1900, and as to the validity of said pardon, is a local one, and it has been determined by the court of appeals of Kentucky that Beckham was governor of Kentucky both de jure and de facto on said date and that said pardon is invalid, and I think I am concluded by that determination. Furthermore, even if said right existed, I do not think that it is one secured to the defendant by the equal protection of the laws clause of the fourteenth amendment. If it is, then every right one has is so secured, and every decision by the State courts against such a right would present a federal question and a ground for removal. This certainly can not be the case."

The statutes of Kentucky for the selection of jurors, and the trial of criminal prosecutions, are not repugnant, in any respect, to the Constitution of the United States

Section 2241 of the Kentucky Statutes provides that the circuit judge of each county shall annually appoint "three intelligent and discreet housekeepers of the county over twenty-one years of age, resident in different portions of the county, and having no action in court requiring the intervention of a jury, as jury commissioners for one year, who

shall be sworn in open court to faithfully discharge their duty." They are required "to take the last returned assessor's book for the county and from it shall carefully select from the intelligent, sober, discreet and impartial citizens, resident housekeepers of different portions of the county, over twenty-one years of age," a certain number of names which they must put into a locked drum or wheel case.

The criminal code of Kentucky contains the following provisions:

Sec. 191. When an issue of fact in a criminal prosecution is about to be tried, the clerk shall draw, in the manner directed by the General Statutes the names of twelve jurors, who, if not challenged by the parties, nor excused by the court, shall compose the trial jury.

Sec. 192. When a juror is excused or a challenge to a juror is sustained the clerk shall draw the name of another juror to fill the panel until the list of standing jurors is exhausted, when the court shall order such a number of qualified jurors as it shall deem sufficient to complete the jury to be summoned by the sheriff, and the panel shall be filled from time to time from the jurors so summoned, and if they be exhausted, similar orders may be made for summoning other jurors, until the jury is completed.

Sec. 193. The court may, for sufficient cause, designate some other officer or person than the sheriff to summon petit jurors, the officer or person designated being first duly sworn in open court to discharge the duty faithfully and impartially.

Sec. 194. If the judge of the court be satisfied, after having made a fair effort, in good faith, for that purpose, that, from any cause, it will be impracticable to obtain a jury free of bias in the county wherein the prosecution is pending, he shall be authorized to order the sheriff to summon a sufficient number of qualified jurors from some adjoining county in which the judge shall believe there is the greatest probability of obtaining impartial jurors, and from those so summoned the jury may be formed.

Sec. 199. A challenge to the panel shall only be for a sub-

stantial irregularity, in selecting or summoning the jury, or in drawing the panel by the clerk.

Sec. 203. The defendant is entitled to fifteen peremptory challenges in prosecutions for felony, and to three in prosecutions for misdemeanor.

Sec. 207. Causes of general challenge are:

1. A want of the qualifications prescribed in the General Statutes.

2. A conviction for a felony.

3. Unsoundness of mind, or such defect in the faculties of the mind or organs of the body as render him incapable of properly performing the duties of a juror.

It shall not be a cause of challenge that a juror has read in the newspapers an account of the commission of the crime with which the prisoner is charged, if such a juror shall state on oath that he believes he can render an impartial verdict according to the law and the evidence; and provided further, that in the trial of any criminal cause the fact that a person called as a juror has formed an opinion or impression, based upon rumor or upon newspaper statements (about the truth of which he has expressed no opinion), shall not disqualify him to serve as a juror in such case, if he shall, upon oath, state that he believes he can fairly and impartially render a verdict therein in accordance with the law and the evidence, and the court shall be satisfied of the truth of such statement.

Sec. 208. Particular causes of challenge are actual and implied bias.

Sec. 209. Actual bias is the existence of such a state of mind on the part of the juror, in regard to the case, or to either party, as satisfies the court, in the exercise of a sound discretion, that he can not try the case impartially and without prejudice to the substantial rights of the parties challenging.

Sec. 271. The court in which a trial is had upon an issue of fact may grant a new trial, if a verdict be rendered against the defendant by which his substantial rights have been prejudiced, upon his motion, in the following cases:

1. If the trial in a case of felony were commenced and completed in his absence.

2. If the jury have received any evidence out of court other than that resulting from a view as provided in this Code.

3. If the verdict have been decided by lot, or in any other manner than by a fair expression of opinion by the jurors.

4. If the court have misinstructed or refused properly to instruct the jury.

5. If the verdict be against law or evidence.

6. If the defendant have discovered important evidence in his favor since the verdict.

7. If from the misconduct of the jury, or from any other cause, the court be of opinion that the defendant has not received a fair and impartial trial.

Sec. 340. A judgment of conviction shall be reversed for any error of law appearing on the record when, upon consideration of the whole case, the court is satisfied that the substantial rights of the defendant have been prejudiced thereby.

The possibility that officers of the state court will disregard the statutes of the state, and practice unlawful discrimination, in summoning jurors at the next trial, is not ground for removal, under section 641.

Unless the officers of the state court, who are charged with the duty of selecting jurors, are guilty of unlawful conduct, there will be no occasion for the parties to challenge the panel on that account, or for the court to pass upon any question in that connection. The right of removal which Powers claims depends upon the *possibility* of unlawful conduct on the part of officers of the state court.

But the possibility, or probability, of such a contingency, however strong, does not authorize the federal court to remove the prosecution, in advance of trial. If the contingency arises, and rights of the defendant under the Constitution of the United States are denied, his remedy is by writ of error from this court, if need be, as in Carter vs. Texas, 177 U. S.

442 and Rogers vs. Alabama, 192 U. S. 226, or by writ of habeas corpus from a federal court under section 753.

Ex parte Wells, 3 Woods, 128; Fed. Cas. No. 17386, was a proceeding before Mr. Justice Bradley to remove a criminal prosecution. The petition for removal alleged that the law for the selection of jurors, which was constitutional and fair on its face, would be so administered as to secure a jury inimical to the petitioners. It also alleged the existence of a general prejudice against the petitioners in the minds of the court, jurors, officers and people "on account of their having been the returning officers of the election held in November, 1876, and republicans in politics." Mr. Justice Bradley, in refusing the application for removal, said:

"The [jury] commissioners, it is true, may abuse their trust; but no system can be devised that will not be liable to abuses.

The allegations with regard to the manipulation of the law in such manner as to secure a jury inimical to the petitioners, and with regard to the existence of a general prejudice against them in the minds of the court, the jurors, the officials and the people, are not within the purview of the statute authorizing a removal. The fourteenth amendment to the Constitution, which guarantees the equal benefit of the laws on which the present application is based, only prohibits state legislation violative of said right; it is not directed against individual infringements thereof. The civil rights bill of 1866 was broader in its scope, undertaking to vindicate those rights against individual aggression; but, still, only when committed under color of some 'law, statute, ordinance, regulation or custom.' And when that provision in this law, which is transferred to section 641 of the Revised Statutes, gave the right to remove to the United States courts a cause commenced in a state court against a person who is denied or can not enforce any of the rights secured by the act, it had reference to a denial of those rights or impediments to their enforcement, arising from some state law, statute, regulation or custom. It is only when some such hostile state legislation can be shown to exist, interfering with the

party's right of defense, that he can have his cause removed to the federal court."

In Virginia vs. Rives, 100 U. S. 313, 322, Mr. Justice Strong said:

"If, as in this case, the subordinate officer whose duty it is to select jurors fails to discharge that duty in the true spirit of the law; if he excludes all colored men solely because they are colored; or if the sheriff to whom a venire is given, composed of both white and colored citizens, neglects to summon the colored jurors only because they are colored, or if a clerk whose duty it is to take the twelve men from the box rejects all the colored jurors for the same reason, it can with no propriety be said the defendant's right is denied by the state and can not be enforced in the judicial tribunals. The court will correct the wrong, will quash the indictment or the panel, or, if not, the error will be corrected in a superior court. We can not think such cases are within the provisions of section 641. Denials of equal rights in the action of the judicial tribunals of the state are left to the revisory powers of this court."

In Neal vs Delaware, 103 U. S. 370, 386, Mr. Justice Harlan, referring to Strauder vs. West Virginia (100 U. S. 303) and Virginia vs. Rives (100 U. S. 313) said:

"But it was also ruled, in the cases cited, that the constitutional amendment was broader than the provisions of section 641 of the revised statutes; that since that section only authorized a removal before trial, it did not embrace a case in which a right is denied by judicial action during the trial, or in the sentence, or in the mode of executing the sentence; that for denials, arising from judicial action, after the trial commenced, the remedy lay in the revisory power of the higher courts of the state, and, ultimately, in the power of review which this court may exercise over their judgments, whenever rights, privileges or immunities, secured by the constitution or laws of the United States, are withheld or violated; and that the denial or inability to enforce in the judicial tribunals of the states, rights secured by any law pro-

viding for the equal civil rights of citizens of the United States, to which section 641 refers is, primarily, if not exclusively, a denial of such rights, or an inability to enforce them, resulting from the constitution or laws of the state, rather than a denial first made manifest at the trial of the case. We held that congress had not authorized a removal where jury commissioners or other subordinate officers had, without authority derived from the constitution and laws of the state, excluded colored citizens from juries because of their race."

Gibson vs. Mississippi, 162 U. S. 565, was a writ of error to review a judgment of conviction for murder, on the ground that the state court had denied a petition for removal under section 641. It was the case of a negro prosecuted for the murder of a white man. The petition for removal alleged that the defendant had been indicted by a grand jury from which the officers charged with its selection had purposely excluded all colored men on account of their color; that although there were seven thousand colored citizens competent for jury service in the county and fifteen hundred whites, no colored men had for many years been summoned on the grand jury, and that citizens of color were purposely excluded from jury service on account of their color, by the officers of the law charged with the selection of jurors. The petition also alleged that by reason of the great prejudice against the defendant on account of his color he could not secure a fair and impartial trial by an impartial petit jury of the county. This court held that the petition did not make out a case for removal, under section 641. Mr. Justice Harlan said at page 582:

"When the constitution and laws of a state, as interpreted by its highest judicial tribunal, do not stand in the way of the enforcement of rights secured equally to all citizens of the United States, the possibility that during the trial of a particular case the state court may not respect and enforce

the right to the equal protection of the laws constitutes no ground, under the statute, ***for removing the prosecution*** into the circuit court of the United States in advance of a trial.

We may repeat here what was said in Neal vs. Delaware, namely, that in thus construing the statute 'we do not withhold from a party claiming that he is denied, or can not enforce in the judicial tribunals of the State, his constitutional equality of civil rights, all opportunity of appealing to the courts of the United States for the redress of his wrongs. For, if not entitled, under the statute, to the removal of the suit or prosecution, he may, when denied, in the subsequent proceedings of the state court, or in the execution of its judgment, any right, privilege or immunity given or secured to him by the constitution or laws of the United States, bring the case here for review."

After referring to Neal vs. Delaware, 103 U. S. 370; Strauder vs. West Virginia, 100 U. S. 303; Virginia vs. Rives, 100 U. S. 313 and Ex parte Virginia, 100 U. S. 339, Mr. Justice Harlan said at page 581:

"But those cases were held to have also decided that the fourteenth amendment was broader than the provisions of section 641 of the Revised Statutes; that since that section authorized the removal of a criminal prosecution before trial, it did not embrace a case in which a right is denied by judicial action during a trial, or in the sentence, or in the mode of executing the sentence; that for such denials arising from judicial action after a trial commenced, the remedy lay in the revisory power of the higher courts of the state, and ultimately in the power of review which this court may exercise over their judgments whenever rights, privileges or immunities claimed under the Constitution or laws of the United States are withheld or violated; and that the denial or inability to enforce in the judicial tribunals of the states rights secured by any law providing for the equal civil rights of citizens of the United States, to which section 641 refers, and on account of which a criminal prosecution may be removed from a state court, is primarily, if not exclusively, a denial of such rights or an inability to enforce them resulting from

the Constitution or laws of the state, rather than a denial first made manifest at or during the trial of the case.

We therefore held in Neal vs. Delaware that congress had not authorized a ***removal of the prosecution from the state court*** where jury commissioners or other subordinate officers had, without authority derived from the Constitution and laws of the state, excluded colored citizens from juries because of their race."

And at page 584:

"The application was to remove the prosecution from the state court, and a *removal*, as we have seen, could not be ordered upon the ground simply that citizens of African descent had been improperly excluded, because of their race, and without the sanction of the constitution and laws of the state, from service on previous grand juries, or from service on the particular grand jury that returned the indictment against the accused.

We do not overlook in this connection the fact that the petition for the removal of the cause into the federal court alleged that the accused, by reason of the great prejudice against him on account of his color, could not secure a fair and impartial trial in the county, and that he prayed an opportunity to subpoena witnesses to prove that fact. Such evidence, if it had been introduced, and however cogent, could not, as already shown, have entitled the accused to the *removal* sought; for the alleged existence of race prejudice interfering with a fair trial was not to be attributed to the constitution and laws of the state. It was incumbent upon the state court to see to it that the accused had a fair and impartial trial, and to set aside any verdict of guilty based on prejudice of race."

In Murray vs. Louisiana, 163 U. S. 101, at p. 105, Mr. Justice Shiras said:

"Several of the assignments of error bring into question the correctness of the judgment of the supreme court of the state of Louisiana affirming the action of the trial court in proceeding with the trial in disregard of a petition by the accused to have the cause removed into the circuit court of

the United States upon the allegation that the petitioner was a negro, and that persons of African descent were, by reason of their race and color, excluded by the jury commissioners from serving as grand and petit jurors.

To dispose of such assignments it is sufficient to cite Neal vs. Delaware (103 U. S. 370) and Gibson vs. Mississippi (162 U. S. 565), decided at the present term, in which, after careful consideration, it was held that congress had not, by section 641 of the revised statutes, authorized a removal of the prosecution from the state court upon an allegation that jury commissioners or other subordinate officers had, without authority derived from the constitution and laws of the state, excluded colored citizens from juries because of their race; that said section did not embrace a case in which a right is denied by judicial action during a trial, or in the sentence, or in the mode of executing the sentence; that for such denials arising from judicial action after a trial commenced the remedy lay in the revisory power of the higher courts of the state, and ultimately in the power of review which this court may exercise over their judgments whenever rights, privileges or immunities claimed under the constitution or laws of the United States are withheld or violated; and that the denial or inability to enforce, in the judicial tribunals of the state, rights secured by any law providing for the equal civil rights of citizens of the United States, to which section 641 refers, and on account of which a criminal prosecution may be removed from a state court, is primarily if not exclusively, a denial of such rights, or an inability to enforce them, resulting from the constitution or laws of the state, rather than a denial first made manifest at and during the trial of the case.

The petition for removal complained of the acts of the jury commissioners in illegally confining their summons to white citizens only, and in excluding from jury service citizens of the race and color of the petitioner, but did not aver that the jury commissioners so acted under or by virtue of the laws or Constitution of the state; nor was there shown, during the course of the trial, that there was any statutory or constitutional enactment of the state of Louisiana which discriminated against persons on account of race, color or previ-

ous condition of servitude, or which denied to them the equal protection of the laws."

In In re Wood, 140 U. S. 278, 285, Mr. Justice Harlan said:

"We do not perceive that anything said in Neal vs. Delaware, would have authorized the circuit court to discharge the appellant from custody, even if, upon investigation, it had found that citizens of the race to which he belongs had been, in fact and because of their race, excluded from the lists of grand and petit jurors from which were selected the grand jurors who indicted and the petit jurors who tried him. That was a matter arising in the course of the proceedings against the appellant, and during his trial, and not from the statutes of New York, and should have been brought at the appropriate time, and in some proper mode to the attention of the trial court. Whether the grand jurors who found the indictment, and the petit jurors who tried the appellant, were or were not selected in conformity with the laws of New York—which laws, we have seen, are not obnoxious to the objection that they discriminate against citizens of the African race, because of their race—was a question which the trial court was entirely competent to decide, and its determination could not be reviewed by the circuit court of the United States, upon a writ of habeas corpus, without making that writ serve the purposes of a writ of error. No such authority is given to the circuit courts of the United States by the statutes defining and regulating their jurisdiction. It often occurs in the progress of a criminal trial in a state court, proceeding under a statute not repugnant to the Constitution of the United States, that questions occur which involve the construction of that instrument and the determination of rights asserted under it. But that does not justify an interference with its proceedings by a circuit court of the United States, upon a writ of habeas corpus sued out by the accused either during or after the trial in the state court. For 'upon the state courts, equally with the courts of the Union, rests the obligation to guard, enforce and protect every right granted or secured by the Constitution of the United States and the laws made in pursuance thereof, when-

ever those rights are involved in any suit or proceeding before them;' and 'if they fail therein, and withhold or deny rights, privileges or immunities secured by the Constitution and laws of the United States, the party aggrieved may bring the case from the highest court of the state in which the question could be decided to this court for final and conclusive determination.' Robb vs. Connolly, 111 U. S. 624, 637."

In Andrews vs. Swartz, 156 U. S. 272, 276, Mr. Justice Harlan said:

"If the state court, having entered upon the trial of the case, committed error in the conduct of the trial to the prejudice of the accused, his proper remedy was, after final judgment of conviction, to carry the case to the highest court of the state having jurisdiction to review that judgment, thence upon writ of error to this court, if the final judgment of such state court denied any right, privilege, or immunity specially claimed, and which was secured to him by the Constitution of the United States. Even if it be assumed that the state court improperly denied to the accused, after he had been arraigned and pleaded not guilty, the right to show by proof that persons of his race were arbitrarily excluded by the sheriff from the panel of grand or petit jurors solely because of their race, it would not follow that the court lost jurisdiction of the case within the meaning of the well-established rule that a prisoner under conviction and sentence of another court will not be discharged on habeas corpus unless the court that passed the sentence was so far without jurisdiction that its proceedings must be regarded as void. Ex parte Siebold, 100 U. S. 371, 375; In re Wood, 140 U. S. 278, 287; In re Shibuya Jugiro, 140 U. S. 291, 297; Pepke vs. Cronan, 155 U. S. 100. When a state court has entered upon the trial of a criminal case, under a statute not repugnant to the Constitution of the United States, and has jurisdiction of the offense and of the accused, no mere error in the conduct of the trial should be made the basis of jurisdiction in a court of the United States to review the proceedings upon writ of habeas corpus."

The circuit court, in view of the foregoing decisions, said that it was "well settled that a class discrimination in the se-

lection of jurors, grand or petit, by subordinate officers charged with their selection, nothing else appearing, is not a denial in the judicial tribunals of the state of the equal protection of the laws within the meaning of section 641." Rec. 272.

The petition for removal does not allege that the officers of the state court will practice unlawful discrimination in selecting jurors at the next trial.

The petition alleges that unlawful discrimination was practiced in summoning jurors at the first three trials. It does not allege that the sheriff of Scott county, now in office, or his deputies, or the present clerk, or jury commissioners, took part therein, or that they intend to act unlawfully. The only allegation concerning the sheriff is that he "is a Goebel democrat, as are also all the deputy sheriffs of said county" (Rec. 19). The only other material allegation is that section 281 of the Criminal Code of Kentucky denies an appeal from a decision of the circuit court on challenges to the panel, and that the court of appeals are therefore powerless to reverse any judgment *if* the substantial rights of the petitioner are prejudiced "by reason of a repetition of the acts hereinbefore set forth, or for any other irregularity or improper conduct in the formation of the jury" (Rec. 24).

The sheriff may have nothing to do with the selection of jurors at the fourth trial. The jury may be drawn wholly from the wheel, or "the court may, for sufficient cause, designate some other officer or person than the sheriff to summon petit jurors, the officer or person designated being first sworn in open court to discharge the duty faithfully and impartially," as provided in section 193 of the Criminal Code.

The possibility that the judge who presides at the next trial in the state court will commit error of law in overruling challenges to the panel is not ground for removing the prosecution into a federal court.

It appears from the opinion of Judge Cochran that the judge who presided at the first and second trials is no longer judge of the circuit court of Scott county. The record shows that the judge who presided at the third trial was specially appointed by the governor from the bar (Rec. 164). He overruled a motion made by Powers to discharge a special venire summoned from Bourbon county, "without any reference" to the affidavits filed in support of the motion and in opposition thereto (Rec. 177); and it is because of that ruling that the court below holds that the prosecution is removable into the federal court. The occasion for such a ruling may not arise again; the petition for removal does not allege that it will; or the judge who presides at the next trial in the state court may take a different view of the law. Does section 641 authorize a judge of the United States to assume jurisdiction of an indictment for an offense against the laws of a state, and to take the accused from the custody of the state, because, in his opinion, a judge of an inferior court of the state committed an error of law at a former trial?

Suppose it was an error to overrule the defendant's exception to the panel, without reference to the affidavits, the defendant's remedy is not to remove the case into the federal court. In Carter vs. Texas, 177 U. S. 442, and Rogers vs. Alabama, 192 U. S. 226, the state court refused to consider evidence in support of objections to the panel, for unlawful discrimination in summoning jurors, and this court held that it was ground for a writ of error. It is not ground for removal. It is not uncommon for inferior state courts to err in construing the Constitution and laws of the United States, but a method is provided for the decent and orderly revision of their judgments. They do not forfeit their jurisdiction, because they have committed error of law.

While the guaranty of equal protection of the laws under the fourteenth amendment applies to action of a state through its courts, as well as through its legislature, the claim, on account of action by a state court, can not be made, in advance of the trial, on the allegation that the circumstances requiring protection will arise during the trial, and that when they arise the court will deny the protection. If they arise, and the protection is denied, the remedy is by writ of error or habeas corpus. The probability that they will arise, no matter how strong, gives no right to a removal under section 641.

Protection against action by a state, through its courts, has never been accorded except on writ of error after the state court has acted.

If there is no writ of error from this court to the court of appeals of Kentucky, or to the circuit court of Scott county, to review the rulings of that court in connection with the impaneling of the jury, that might furnish a ground for writ of habeas corpus after conviction, but it does not justify the removal of the prosecution into the federal court in advance of trial.

The statute will not be enlarged by construction. In Virginia vs. Paul, 148 U. S. 107, 114, Mr. Justice Gray said:

"The prosecution and punishment of crimes and offences committed against one of the States of the Union appropriately belong to the courts and authorities of the State, and can be interfered with by the circuit court of the United States so far only as Congress, in order to maintain the supremacy of the Constitution and laws of the United States, has expressly authorized either a removal of the prosecution into the circuit court of the United States for trial, or a discharge of the prisoner by writ of habeas corpus issued by that court or by a judge thereof. Tennessee vs. Davis, 100 U. S. 257; Virginia vs. Rives, 100 U. S. 313; Davis vs. South

Carolina, 107 U. S. 597; In re Neagle, 135 U. S. 1; Huntington vs. Attrill, 146 U. S. 657, 672, 673."

The circuit court laid stress upon the fact that the Commonwealth did not file a traverse denying the allegations of the petition for removal. That was not necessary or proper. What the circuit court of Scott county had ruled was matter of record. In that court the Commonwealth denied that the sheriff had been guilty of misconduct in summoning the jury and filed affidavits in answer to those of the defendant. The Commonwealth does not admit, and in the circuit court of Scott county did not admit, that there was any misconduct. The circuit court of Scott county overruled Powers' motion "without any reference to said affidavits," because it was not claimed by Powers "that said jurors are not sensible, discreet and sober men, and housekeepers of Bourbon county, over the age of twenty-one years." Rec. 177.

The two affidavits in support of the motion were wholly insufficient, that of Powers (Rec. 177) being upon information and belief, and that of Whaley (Rec. 180) showing no knowledge of material facts. He had nothing to do with summoning the jurors. He evidently made up a list of republicans and independent democrats, who were not summoned, and swore that the deputy sheriffs "purposely" passed them by. The deputy sheriffs filed affidavits denying that they summoned or failed to summon any one on account of party affiliations. They alleged that they did not know the politics of a large number of those they summoned, and that they discharged their duty "honestly and conscientiously, and without any desire or purpose to injure or prejudice the rights of the defendant Caleb Powers." They averred that many of those named in the defendant's affidavits as republicans and independent democrats, who were passed by, were in fact lifelong democrats; that most of the venire were summoned in the night time while a severe storm was raging, and that as

to a number of the persons mentioned in defendant's affidavits as having been passed by, they visited their house and endeavored to secure entrance so that they might be summoned for jury service, but their endeavors to secure entrance met with no response (Affidavits of Rogers and Burke, Rec. 183 and Lusby and Williams, Rec. 186).

The defendant renewed his motion the next day, and the affidavits for the defendant and the Commonwealth were submitted. The record recites that "the court, being sufficiently advised, overruled said motion." Rec. 195. The presumption is that the court finally overruled the defendant's motion upon consideration of the evidence. If so, the only ground given by the court below, for its decision, disappears. The presumption of law is in favor of the regularity and validity of the proceedings in the state court.

The right to trial by an impartial jury in a state court is not guaranteed by the Constitution or laws of the United States.

Brooks vs. Missouri, 124 U. S. 394, was a writ of error to the supreme court of Missouri from a judgment affirming a conviction for murder in a trial court of the State, on the ground, among others, that the trial court had deprived the defendant of an impartial jury. The writ was dismissed for want of jurisdiction.

Chief Justice Waite said, at p. 397:

"Others of the exceptions taken at the trial relate to rulings by means of which, it is claimed, the defendant was deprived of an impartial jury; but it does not appear to have been claimed that any provision of the Constitution of the United States guaranteed to him such a jury. That the sixth article of the amendments contains no such guaranty as to trials in the state courts has always been held. Spies vs. Illinois, 123 U. S. 131, 166, and the cases there cited."

In Central Land Company vs. Laidley, 159 U. S. 103, 112, Mr. Justice Gray said:

"When the parties have been fully heard in the regular course of judicial proceedings, an erroneous decision of a state court does not deprive the unsuccessful party of his property without due process of law, within the fourteenth amendment of the Constitution of the United States. Walker vs. Sauvinet, 92 U. S. 90; Head vs. Amoskeag Co., 113 U. S. 9, 26; Morley vs. Lake Shore Railroad, 146 U. S. 162, 171; Bergemann vs. Backer, 157 U. S. 655."

In Marrow vs. Brinkley, 129 U. S. 178, the court dismissed a writ of error to the supreme court of appeals of Virginia, for want of jurisdiction, on the ground that the plaintiff in error had not been deprived of his property without due process of law even if the highest court of the state, proceeding on principles of general law only, had erred in rendering a judgment or decree affecting property.

In Howard vs. Fleming, 191 U. S. 126, the court dismissed a writ of error to the supreme court of North Carolina in a criminal case, for want of jurisdiction. It was assigned as error that the defendant had been convicted of a conspiracy to defraud, although there was no statute of the state defining or punishing such a crime. Mr. Justice Brewer said, p. 135:

"There is in North Carolina no statute defining or punishing such a crime, but the supreme court held that it was a common law offense, and as such cognizable in the courts of the state. In other words, the supreme court decided that a conspiracy to defraud was a crime punishable under the laws of the state, and that the indictment sufficiently charged the offense. Whether there be such an offense is not a federal question, and the decision of the supreme court is conclusive upon the matter. Neither are we at liberty to inquire whether the indictment sufficiently charged the offense. Caldwell vs. Texas, 137 U. S. 692, 698; Davis vs. Texas, 139 U. S. 651, 653; Bergemann vs. Backer, 157 U. S. 655."

The decision upon another assignment of error is shown by the following passage from the opinion at page 136:

"Again, it is said that there was not due process, because the trial judge refused to instruct the jury on the presumption of innocence. He did charge that the guilt of the accused must be shown beyond a reasonable doubt, and that on a failure in this respect it was the duty to acquit. He also explained what is meant by the term 'reasonable doubt.' The supreme court sustained the charge. Of course, that is a decision of the highest court of the state that in a criminal trial it is sufficient to charge correctly in reference to a reasonable doubt and that an omission to refer to any presumption of innocence does not invalidate the proceedings. In the face of this ruling as to the law of the state, the omission in a state trial of any reference to the presumption of innocence can not be regarded as a denial of due process of law."

In re Converse, 137 U. S. 624, was a petition for a writ of habeas corpus on the ground that the petitioner who had been sentenced to imprisonment by a state court upon conviction in a criminal case, was deprived of his liberty without due process of law, contrary to the provisions of the fourteenth amendment.

Chief Justice Fuller said, p. 631:

"The state can not be deemed guilty of a violation of its obligations under the Constitution of the United States because of a decision, even if erroneous, of its highest court, while acting within its jurisdiction."

While the foregoing decisions were not made upon proceedings for removal under section 641, the fundamental principle which they declare is applicable to that section.

Strauder vs. West Virginia, 100 U. S. 303, is the only reported case in which a removal under section 641, has been sustained, and that was on the ground that a state *statute* denied to colored citizens the right to sit as jurors, because

of their color, although qualified in all other respects. The court said that the fourteenth amendment "was designed to assure to the colored race the enjoyment of all the civil rights that under the law are enjoyed by white persons, and to give to that race the protection of the general government, in that enjoyment, whenever it should be denied by the states"; that section 641 "plainly has reference to sections 1977 and 1978," and "puts in the form of a statute what had been substantially ordained by the constitutional amendment."

Section 281 of the Criminal Code of Kentucky is not repugnant to the Constitution of the United States and does not authorize a removal, in advance of trial.

That section provides that "The decisions of the court upon challenges to the panel and for cause, upon motions to set aside an indictment, and upon motions for a new trial, shall not be subject to exception."

The right of appeal in a criminal case is left entirely to the discretion of the state, and is not guaranteed by the federal constitution:

Kohl vs. Lehlback, 160 U. S. 293.
Mallett vs. North Carolina, 181 U. S. 589.
Missouri vs. Lewis, 101 U. S. 22.
Andrews vs. Swartz, 156 U. S. 272.

If any right of a defendant in a criminal case, under the Constitution or laws of the United States, in connection with a challenge to a panel, or upon motion to set aside an indictment, or upon motion for a new trial, is denied by a state court, the remedy is by writ of error from this court, as in Carter vs. Texas, 177 U. S. 442, and Rogers vs. Alabama, 192 U. S. 226, or by writ of habeas corpus from a federal court, after conviction, under section 753 of the Revised Statutes.

Due process of law and the equal protection of the laws does not require that there shall be right of appeal from a criminal prosecution in the state court.

In Andrews vs. Swartz, 156 U. S. 272, the court held (Syl.):

"A review by the appellate court of a state of a final judgment in a criminal case is not a necessary element of due process of law, and may be granted, if at all, on such terms as to the state seems proper."

The state of Kentucky, without violating the federal constitution, might provide that there should be no appeal in any criminal case. For nearly a century there was no appeal in criminal cases in the federal courts.

The Commonwealth is entitled to a writ of mandamus.

Virginia vs. Rives, 100 U. S. 313.
Virginia vs. Paul, 148 U. S. 107.

In Virginia vs. Paul, 148 U. S. 107, 123, Mr. Justice Gray said:

"A stronger case for issuing a writ of mandamus can hardly be imagined. The writ may be directed to the judge who has unlawfully assumed jurisdiction of the prosecution; and no previous motion to him to remand the case was necessary. The case is governed in every particular by Virginia vs. Rives, 100 U. S. 313, 316, 323, 324."

We respectfully submit that the writ should be allowed, and that Caleb Powers should be remanded to the state court for trial.

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